No. 79-1709

In the Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether consecutive sentences may be imposed for conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846.

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Hearings on Drug Abuse Control Amendments of 1970 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) 26-27, 33
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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 26a-55a) is reported at 612 F.2d 906. The panel opinion of the court of appeals (Pet. App. 1a-21a) is reported at 585 F.2d 1234.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1980. On March 19, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to April 27, 1980. The petition was filed on Monday, April 28, 1980, and was granted on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. 21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

3. 21 U.S.C. 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to import marijuana (Count 1), in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana (Count 2), in violation of 21 U.S.C. 846. Petitioner Rodriguez received consecutive sentences on each count of four and one-half years' imprisonment and a two-year term of special parole; petitioner Albernaz received consecutive sentences of three and one-half years' imprisonment and a two-year term of special parole on each count (Pet. App. 7a n.4).[1] A panel of the court of appeals affirmed (*id.* at 1a-21a). On rehearing en banc, limited to the issue of cumulative punishment for conviction on the two conspiracy counts (*id.* at 22a-23a), the Fifth Circuit affirmed petitioners' consecutive sentences, with one judge dissenting (*id.* at 26a-55a).

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[1] The petition for a writ of certiorari did not challenge the propriety of imposing a special parole term as part of petitioners' sentences for the drug conspiracy offenses. In *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this Court held that a special parole term may not be imposed upon a defendant convicted of a drug conspiracy. In light of the decision in *Bifulco*, petitioners may move the district court for correction of their sentences under Fed. R. Crim. P. 35.

1. The evidence at trial showed that in late December 1976, undercover Drug Enforcement Administration (DEA) Agent Theodore Weed was introduced to petitioner Albernaz, who was seeking boats that could be used for unloading large quantities of marijuana from a freighter at sea and transporting the marijuana to the Florida coast. Weed stated that he had such a vessel. Albernaz offered to pay Weed $200,000 or 10 percent of the value of the marijuana, which was variously estimated to weigh between 15,000 and 40,000 pounds. Petitioners told Weed that his 10 percent share would probably be worth $1 million (Tr. 69-71, 83-86, 120-121, 134).[2]

During the next several weeks Albernaz and Weed held numerous meetings at which Weed met other individuals involved in the scheme, including petitioner Rodriguez. In turn, Weed introduced the conspirators to several undercover DEA agents, including John McCutcheon. Weed said that these individuals were assisting him to prepare his vessel for the operation (Tr. 97-108, 134-135, 164-167). In addition, petitioners and Weed inspected a marina near Fort Lauderdale, Florida, for possible use as a landing site for Weed's boat. While there, Rodriguez remarked that the marijuana could be rapidly removed from Weed's vessel because Rodriguez' trucks had rollers and his accomplices were "professionals" (Tr. 103-104).

By late January 1977 the parties were prepared to carry out the scheme. Plans were made by the agents to use a vessel known as the *Catchalot II*, whose captain was cooperating with the agents. Petitioners selected Bahia Honda Island, in the Florida Keys, as the landing site (Tr. 169-179). Albernaz

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[2] "Tr." refers to the transcript of the trial.

gave agent McCutcheon and the captain of the *Catchalot II* their final instructions, including the coordinates for the rendezvous with the freighter and codes for use in communicating between the ships (Tr. 180, 346-349).

The *Catchalot II*, with its crew of DEA agents, Customs officers, and civilians, left West Palm Beach on the evening of January 27. After being notified of the departure, Albernaz explained that the *Catchalot II* would approach the shore upon its return and transfer the marijuana to life rafts, which would be towed to waiting Winnebago vehicles that had been refitted with heavy springs and shock absorbers to avoid an outward appearance of carrying a heavy load (Tr. 178-182, 285, 373-374, 383).

For the next two days the *Catchalot II* unsuccessfully attempted to contact the freighter. When made aware of the difficulty, petitioners, together with co-defendant William Martins, chartered a plane and flew over the freighter and the *Catchalot II;* messages were dropped to each ship indicating the location of the other craft (Tr. 351-354, 427-437). That afternoon the vessels established contact, and 150 bales of marijuana were transferred from the freighter to the *Catchalot II* (Tr. 359).

Purportedly in order to allow this marijuana to be moved to a lower deck, the transfer of additional bales was postponed. The *Catchalot II* then moved a short distance away from the freighter and awaited the arrival of the Coast Guard, which had been notified of the transaction. Several hours later a Coast Guard vessel arrived, seized the freighter, and arrested the crew (Tr. 360-362, 389-393). At about the same time petitioners were arrested by DEA agents in Miami (Tr. 67, 387, 450-451, 517, 533, 736).

2. In affirming petitioners' sentences, the en banc court of appeals held (Pet. App. 30a-42a) that the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*) authorized the imposition of consecutive sentences upon defendants convicted of both conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. The court also held (Pet. App. 42a-48a) that the Double Jeopardy Clause does not bar cumulative penalties, imposed in a single sentencing proceeding following a single trial, that Congress has authorized for violations of separate statutory provisions.[3]

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[3] In the original panel opinion, the court of appeals reversed the convictions of co-defendants Martins and Peter Smigowski for conspiracy under 21 U.S.C. 846, finding that the evidence was insufficient to show their involvement in a conspiracy to distribute the marijuana once it reached the United States (Pet. App. 16a-17a). As to petitioners, however, the panel found sufficient evidence that they had arranged to transport and distribute the marijuana in this country (*id.* at 15a-16a). The en banc court reaffirmed the panel's disposition (Pet. App. 28a-29a nn. 1-3, 48a-49a). Petitioners, together with Martins and Smigowski, filed a separate petition (No. 79-1930) seeking review of their convictions with regard to issues other than the sentencing issue involved in the present case. This Court denied that petition on October 6, 1980.

In addition, the 13 members of the freighter's crew were charged as co-conspirators and convicted in a separate trial. On appeal, the same panel that decided petitioners' appeal affirmed the crew members' convictions for conspiracy to import marijuana, but reversed the conviction for conspiracy to distribute as to the one individual among the 13 whose sentence on the two counts had not been ordered to run concurrently. *United States* v. *Cadena*, 585 F.2d 1252, 1266 & n.32 (5th Cir. 1978).

SUMMARY OF ARGUMENT

I.

The language and structure of the Comprehensive Drug Abuse Prevention and Control Act of 1970 clearly indicate that a conspiratorial agreement encompassing both illegal importation and illegal distribution of marijuana constitutes two separate offenses subject to cumulative punishments. Such a conspiracy violates the prohibitions of two different subchapters of the Act, each of which authorizes a sentence measured by the sentence for the underlying substantive offense. Given the existence of distinct subchapters with distinct offense and penalty provisions, the Act on its face should be read to permit consecutive sentences to be imposed for conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846.

Moreover, this interpretation is supported by the "rule of statutory construction stated by this Court in *Blockburger* v. *United States*, 284 U.S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Whalen* v. *United States*, 445 U.S. 684, 691 (1980). "In the *Blockburger* case the Court held that '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact [that] the other does not' " (*id.* at 692, quoting 284 U.S. at 304). Without question, Sections 846 and 963 each require proof of a different element. Thus, like *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (1946), in

which the Court applied the *Blockburger* test to uphold consecutive sentences for a conspiracy encompassing two Sherman Act offenses, Sections 846 and 963 prescribe "separate statutory offenses" subject to consecutive sentences.

Nor is a different result suggested by *Braverman* v. *United States*, 317 U.S. 49 (1942). In that case, the Court construed the general conspiracy statute (18 U.S.C. 371) not to authorize multiple convictions for a single agreement to commit several unlawful acts. In contrast to *Braverman*, in which the conspiratorial agreement "violate[d] but a single statute * * * [and hence] only the single penalty prescribed by the statute can be imposed" (317 U.S. at 54), petitioners' conspiracy violated two specific statutory provisions. As in *American Tobacco*, "we have here separate statutory offenses, one * * * made criminal by [Section 846] and the other by [Section 963]" (328 U.S. at 788). In these circumstances, *Braverman* does not preclude the imposition of consecutive sentences.

In addition, petitioners have failed to rebut the presumption under *Blockburger* that Sections 846 and 963 authorize cumulative penalties for conspiracy to import and to distribute drugs. As petitioners recognize, the legislative history is silent on this issue. But "Congress in enacting legislation rarely specifies its intent on this matter [of consecutive sentences]." *Whalen* v. *United States*, *supra*, 445 U.S. at 692, quoting H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 114 (1970). Since Congress is "predominately a lawyers' body" rather than "a body of laymen unfamiliar with the commonplaces of our law" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), it is appropriate to assume that Congress was aware of the settled *Blockburger* doctrine and legislated

against that background. Likewise, although the existence of separate conspiracy provisions in the Drug Control Act originally arose from the fact that two Committees considered the legislation in the House, Congress was fully cognizant of Sections 846 and 963 when it adopted the Act, and there is no reason to believe that "Congress was unaware of what it accomplished * * *." *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 12. Finally, the rule of lenity does not compel a contrary conclusion, since application of the *Blockburger* doctrine resolves any purported ambiguity that might otherwise serve as the premise for lenity, and "Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws." *Gore* v. *United States*, 357 U.S. 386, 391 (1958).

II.

If Sections 846 and 963 are construed to authorize consecutive sentences for conspiracy to import and to distribute drugs, the imposition of such sentences does not violate petitioners' Fifth Amendment right against being placed twice in jeopardy for the same offense. As the Court recognized in *Whalen* v. *United States*, *supra*, the Double Jeopardy Clause does not "restrict the legislative power * * * to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them * * *" (445 U.S. at 689). Here, as in *Whalen*, "[t]he dispositive question * * * is whether Congress did * * * provide [for cumulative punishments]" (*ibid.*). Since Congress authorized consecutive sentences under Sections 846 and 963, the Double Jeopardy Clause is no more offended here than if Congress had enacted an equivalent statute—which incontrovertibly would be constitutional—expressly providing a maximum term

of imprisonment of 10 years for conspiracy to both import and distribute marijuana and five years for conspiracy to commit only one of the proscribed objectives.

Even if it were assumed that there may be some circumstances in which multiple punishments authorized by Congress could be unconstitutional under the Double Jeopardy Clause, petitioners' sentences in this case would nonetheless be valid. To the extent that the Clause limits the authority of the legislature to define criminal offenses and to fix criminal penalties, "[t]he *Blockburger* test * * * is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes." *Simpson* v. *United States*, 435 U.S. 6, 11 (1978). Conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, plainly satisfy the *Blockburger* standard. As the Court held in *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 788, nothing in the Double Jeopardy Clause forbids Congress to conclude that such an agreement to commit two offenses is more pernicious and should be more severely punished than an agreement to commit one offense.

ARGUMENT

Petitioners do not dispute that their conspiracy to import and distribute marijuana violated both 21 U.S.C. 846 and 21 U.S.C. 963. Notwithstanding the existence of these distinct provisions, however, petitioners contend that Sections 846 and 963 do not authorize the imposition of consecutive sentences because this criminal enterprise involved only a single agreement encompassing the dual objectives of im-

portation and distribution.[4] They further contend that, regardless of statutory authorization, such sentences are barred by the Double Jeopardy Clause. Contrary to these arguments, consecutive sentences were properly imposed upon petitioners' convictions for conspiracy to import and distribute marijuana, in violation of 21 U.S.C. 846 and 963.[5]

I. SECTIONS 846 AND 963 AUTHORIZE THE IMPOSITION OF CONSECUTIVE SENTENCES FOR CONSPIRACY TO IMPORT AND TO DISTRIBUTE MARIJUANA

A.

This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 5. See also, *e.g.*, *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979), and cases cited therein; *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979),

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[4] The length of the combined sentences imposed on each petitioner exceeds the maximum five-year sentence permissible under either Section 846 or Section 963 for marijuana offenses (see Pet. App. 29a n.4).

[5] Petitioners contest only the imposition of cumulative punishments under Sections 846 and 963; they do not challenge the propriety of either the indictment or the jury's verdict upon separate counts. See *United States* v. *Honneus*, 508 F.2d 566, 570 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F.2d 637, 640 (6th Cir. 1973); see also *Iannelli* v. *United States*, 420 U.S. 770, 786 n.18 (1975).

and cases cited therein; *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

Here, the language of the statutes clearly indicates that 21 U.S.C. 846 and 21 U.S.C. 963 establish separate offenses that are subject to cumulative penalties. Section 846, which is contained in Subchapter I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereinafter "Drug Control Act"), provides that "[a]ny person who * * * conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy" (21 U.S.C. 846). This provision unambiguously proscribes conspiracy to commit any offense defined in Subchapter I, including conspiracy to distribute marijuana (see 21 U.S.C. 841(a)(1)), and authorizes for such conspiracy a sentence of imprisonment or a fine that does not exceed the penalty specified for the object offense. Likewise, Section 963, which is part of Subchapter II of the Drug Control Act, contains an identical provision for conspiracy to commit any offense defined in that subchapter, including conspiracy to import marijuana (see 21 U.S.C. 960(a)(1)). Thus, a conspiratorial agreement having the objective both to import and to distribute marijuana implicates both subchapters, each of which authorizes a sentence based on the punishment provided for the underlying substantive offense. Given the existence of distinct subchapters with distinct offense and penalty provisions, we submit that the Act permits separate sentences to be imposed for conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846.

This interpretation—that Sections 846 and 963 authorize consecutive sentences for conspiracy to import and distribute marijuana—is also supported by the "rule of statutory construction stated by this Court in *Blockburger* v. *United States*, 284 U.S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Whalen* v. *United States*, 445 U.S. 684, 691 (1980). "In the *Blockburger* case the Court held that '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not' " (*id.* at 692, quoting 284 U.S. at 304). See also, *e.g.*, *Harris* v. *United States*, 359 U.S. 19 (1959) (consecutive sentences permitted where single drug transaction violated distinct statutes); *Gore* v. *United States*, 357 U.S. 386 (1958) (same). *Blockburger* "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). See also *Illinois* v. *Vitale*, No. 78-1845 (June 19, 1980), slip op. 6 & n.6; *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977).[6]

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[6] There is no merit to petitioners' contention (Br. 22) that this Court's recent decision in *Whalen* v. *United States*, *supra*, has modified the *Blockburger* test. Nothing in the opinion indicates that the Court intended to abandon or alter the

The Court has previously applied the *Blockburger* standard in the context of cumulative penalties for an unlawful agreement to commit two distinct offenses. In *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), defendants were convicted of conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act (15 U.S.C. 1), and conspiracy to monopolize, in violation of Section 2 of the Sherman Act (15 U.S.C. 2). The defendants contended that consecutive sentences for these offenses were impermissible because there was "but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). In rejecting this claim, the Court first observed that "we have here separate statutory offenses, one a conspiracy in restraint of trade * * * and the other a conspiracy to monopolize * * *. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*). Relying on *Blockburger*, the Court then upheld the consecutive sentences on the ground that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although

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settled doctrine of *Blockburger*. To the contrary, *Whalen* expressly relied on the rationale of *Blockburger* in analyzing the District of Columbia felony-murder statute (445 U.S. at 691-694), and the Court specifically denied that it had "appl[ied] the *Blockburger* rule to the facts alleged in a particular indictment" (*id.* at 694 n.8). In any event, it is immaterial here whether *Blockburger* is applied to the elements of the statute or the charges in the particular case since, under either standard, petitioners' involvement in the planned importation of marijuana was distinct from their role in the contemplated distribution of the marijuana. See page 16 and note 8, *infra*.

the objects of the conspiracies may partially overlap" (328 U.S. at 788).[7]

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[7] Contrary to the possible suggestion in *Sanabria* v. *United States*, 437 U.S. 54, 74 n.33 (1978), there can be no doubt that *American Tobacco* involved a single agreement to violate two separate statutes; indeed, if two separate agreements had been present, consecutive sentences would have been clearly permissible and resort to the *Blockburger* test would have been unnecessary. As noted on page 13, *supra*, the defendants argued, and the Court understood, "that there is but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). Later in the opinion, the Court noted that "the jury found that the [defendants] conspired to fix prices and to exclude undesired competition against them in the purchase of * * * tobacco" (*id.* at 798) and that the "evidence convinced the jury of the existence of a combination or conspiracy to fix and control prices and practices as to domestic leaf tobacco, *both in restraint of trade as such, and to establish a substantially impregnable defense against any attempted intrusion by potential competitors into these markets*" (*id.* at 800; emphasis added). The Court further noted that "[t]he verdicts show also that the jury found that the [defendants] conspired to fix prices and to exclude undesired competition in the distribution and sale of their principal products" (*id.* at 804). On this basis, the Court concluded that "the jury could have found from the actual operation of the [defendants] that there existed *a combination or conspiracy among them not only in restraint of trade, but to monopolize a part of the tobacco industry*" (*id.* at 797-798; emphasis added).

The same analysis was advanced by the lower court and the parties in *American Tobacco*. The court of appeals noted that "[t]he allegations of fact are the same for each count on which the parties were convicted" (147 F.2d 93, 99 (6th Cir. 1944)), and it concluded (*id.* at 115, 116-117):

> [T]he jury did find [defendants] guilty of conspiracy to restrain trade by price-fixing, as well as of conspiracy to monopolize by the same means * * *.
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> Sections 1 and 2 of the Sherman Act * * * cover different matters. The crime defined by Section 1 is legally

In our view, *American Tobacco* is controlling here. Sections 846 and 963 are unquestionably "two dis-

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> distinct from the crime defined by Section 2. Offenses under these sections are not identical even though all the evidence is applicable to a count under Section 1, as well as to a count under Section 2. Congress may provide that separate steps in a single transaction shall constitute separate offenses. If offenses are distinct in law they are not identical, regardless of how closely they are connected in point of fact. A single act may be an offense against two statutes. The test laid down by the adjudicated cases as to the identity of offenses under separate statutory provisions, is, whether each statutory provision requires proof of a fact which the other does not. A conspiracy in restraint of trade, violative of the first section, is not identical with a conspiracy to monopolize trade, violative of the second.

Similarly, the parties consistently argued in this Court that there was only one agreement to violate Sections 1 and 2 of the Sherman Act. The government stated that "[e]ach of the counts alleges that the crime was committed by the same methods, means, and practices" and that "[t]he evidence upon which the jury found the [defendants] guilty, when viewed as a whole, shows a single panorama of monopoly secured and maintained through combination and conspiracy" (U.S. Br. 7, 8). Defendant American Tobacco repeatedly asserted that "price fixing is the gist of all * * * offenses charged in the information" (American Tobacco Br. 49-50), that "[t]he conspiracy [to monopolize] as described in the information was identical with the price-fixing conspiracy in restraint of trade charged in the first count" (*id.* at 51), that "[p]rice-fixing was the only conspiracy charged or attempted to be proved" (*id.* at 93), and that "there was but one conspiracy * * * the continuing conspiracy to fix prices" (*id.* at 149). See also *id.* at 55, 89, 152, 156. The other defendants took a like position. See Liggett & Myers Br. 4-5 ("there is no factual difference between the price-fixing charge and the monopoly charges, and there is no difference in the proofs"); R. J. Reynolds Br. 95 ("all acts and intents alleged were charged to have been done and entertained in formulation and

tinct statutory provisions" (*Blockburger* v. *United States*, *supra*, 284 U.S. at 304). Moreover, since Section 846 and Section 963 specify different ends as the proscribed object of the conspiracy—distribution and importation, respectively—it is manifest that "each provision requires proof of a fact [that] the other does not" (*ibid.*). Thus, like Sections 1 and 2 of the Sherman Act, Sections 846 and 963 prescribe "separate statutory offenses" subject to consecutive sentences (*American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 788).

This analysis under *Blockburger* and *American Tobacco* is reinforced by the fact that Section 846 and Section 963 are directed to separate evils presented by drug trafficking. Criminal efforts relating to importation and to distribution of marijuana pose diverse societal harms, and, as the court of appeals observed, "Congress has in effect determined that a conspiracy to import drugs [and to distribute them] is twice as serious as a conspiracy [to do either object singly]" (Pet. App. 40a, quoting *United States* v. *Marotta*, 518 F.2d 681, 685 (9th Cir. 1975)). Although in this case the distinct objectives were joined in a single agreement and the conspirators were apprehended before their objectives could be achieved, these circumstances do not in any way obscure the conclusion that Sections 846 and 963 serve to protect against different social dangers and therefore that a separate penalty for the violation of each statute is justified.[8]

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execution of a single conspiracy * * *[,] and * * * the evidence offered to support each of the counts was the same").

[8] In addition to the separate interests protected by Section 846 and Section 963, different (albeit overlapping) evidence was introduced to establish petitioners' roles in each aspect

Petitioners seek to answer the foregoing analysis by contending (Br. 21-23) that *Blockburger* is simply inapplicable where conspiracy offenses rather than substantive crimes are charged. Quoting *Braverman* v. *United States*, 317 U.S. 49, 53 (1942), they argue (Br. 22-23) that "[w]hether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

As already discussed, petitioners' contention is foreclosed by *American Tobacco*, in which the Court applied the *Blockburger* test to conspiracy offenses. Nor does *Braverman* support petitioners' position. In that case, the Court construed the predecessor to the general conspiracy statute (18 U.S.C. 371) not to authorize multiple convictions for a single agreement to commit several unlawful acts. Unlike *American Tobacco* or the instant case, the conspiratorial agreement in *Braverman* "violate[d] but a single statute," and the Court concluded that "[f]or such a violation, only the single penalty prescribed by the statute can be imposed" (317 U.S. at 54). As the

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of the conspiracy to import and distribute marijuana. See Pet. App. 15a-16a, 29a nn.2-3. Indeed, the court of appeals in this case (Pet. App. 14a-17a, 28a-29a nn.1-3) and in a companion case involving 13 co-conspirators (*United States* v. *Cadena*, 585 F.2d 1252, 1266 & n.32 (5th Cir. 1978)) sustained the convictions of certain defendants for conspiracy to import but reversed for insufficient evidence with respect to the charge of conspiracy to distribute. See note 3, *supra*. Thus, the record clearly establishes the existence of two distinct plans as part of the drug conspiracy in this case, making it in this respect a stronger case than *American Tobacco* for allowing cumulative punishments.

Court subsequently emphasized, *Braverman* "held that a single conspiracy, charged under the general conspiracy statute, however diverse its objects may be, violates but a single statute and no penalty greater than the maximum provided for one conspiracy may be imposed" (*Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946)). And the Court in *American Tobacco* distinguished *Braverman* on the ground that "[i]n contrast to the single conspiracy described in that case in separate counts, all charged under the general conspiracy statute, * * * we have here separate statutory offenses, one * * * made criminal by § 1 and the other by § 2 of the Sherman Act" (328 U.S. at 788). Thus, as the Court expressly noted in *Braverman* itself, a single agreement in violation of the general conspiracy statute "differs from * * * a single act *which violates two statutes*" (317 U.S. at 54; emphasis added).[9]

Petitioners' reading of *Braverman* has also been rejected by legal commentators. At the time it was decided, *Braverman* was understood to be "appli-

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[9] Although petitioners correctly point out (Br. 23) that the *Blockburger* test did not bear on the question presented in *Braverman*, the inapplicability of *Blockburger* did not result, as they assert, from the unique nature of the crime of conspiracy. In *Braverman*, the defendant was charged with an unlawful agreement to violate several substantive statutes. Although "[t]he one agreement * * * envisage[d] the violation of several statutes rather than one" (317 U.S. at 53), the agreement itself was proscribed by only the general conspiracy statute. In contrast to the *Braverman* issue concerning multiple violations of the same statute, *Blockburger* was formulated to determine whether cumulative punishments are permissible for offenses defined in "two distinct statutory provisions" (284 U.S. at 304). See also *Sanabria* v. *United States*, 437 U.S. 54, 70 n.24 (1978). As demonstrated by *American Tobacco*, the *Blockburger* test does apply to conspiracy offenses.

cable in a situation in which, although the several substantive offenses contemplated in the agreement would violate several statutes, the agreement itself is a criminal conspiracy in violation of only one statute directed against conspiracies." Annot., *Several Conspiracies as Predicable Upon Single Agreement to Commit Several Offenses*, 87 L.Ed. 29, 37 (1943). However,

> in a situation in which an agreement contemplating manifold criminal purposes is in violation of two or more separate statutes penalizing criminal conspiracies of different kinds * * *[,] it is believed that * * * [*Braverman*] is not applicable * * *, at least, where one statute necessitates proof of a circumstance or element different from that which the other requires.
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> From these premises it seems to follow that a single agreement to commit several offenses may be prosecuted and penalized as constituting several conspiracies where it violates two or more conspiracy statutes, even though, where the agreement is in violation of but one conspiracy statute, it is not proper to predicate thereon several conspiracies on the ground that the substantive offenses contemplated in the agreement violate more than one statute.
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> For this reason, it is believed that the value, as precedents, of the cases which have predicated several conspiracies upon a single agreement to commit several offenses where such agreement was in violation of *more than one conspiracy statute* is not affected by the decision in [*Braverman*].

Id. at 37-38 (emphasis in original). This view was later confirmed by the Court's decision in *American Tobacco* (see pages 13-17, *supra*). As one subsequent commentary has explained:

Under a conspiracy statute construed as aimed at least in part at dangers connected with the specific object, it seems that cumulative punishment should be imposed for such a combination to the same extent as would be authorized for the substantive offenses, since the agreement increases the likelihood of commission and the potential harmful effects of each contemplated offense. In *Braverman* v. *United States*, the Supreme Court held that under the general federal conspiracy statute a single agreement is only one conspiracy no matter how diverse its objects. This case seems to indicate that the increased specific dangers attributable to the contemplation of additional objects are not sufficient to warrant separate punishment under the general statute, and that a separate general danger is indispensable to each offense.

* * * * *

It has been held that cumulative punishment may be imposed for a single conspiracy which violates more than one statutory provision. * * * [T]his result is not inconsistent with *Braverman*, since that case involved the construction of a single provision. *American Tobacco Co.* v. *United States*, a leading conspiracy case, can be interpreted as holding that a legislative intent that punishment should be cumulative can be inferred from the mere existence of more than one statutory provision applicable to a single set of facts. However, in recent decisions in other areas the Court has investigated legislative purpose more carefully * * *. * * * In examining legislative intent it seems that the courts should ask whether the two prohibitions are aimed at either the protection of different interests or the prevention of different evils. Thus cumulative punishment is not warranted under two or more

> statutes which are all directed primarily against the general danger created by a conspiracy or all directed against the same specific evil. On the other hand, if the two statutes are aimed at different specific evils, cumulative sentences seem warranted.

Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 964-966 (1969) (footnotes omitted).

In accordance with our analysis, two courts of appeals, in addition to the en banc Fifth Circuit in the instant case, have held that Sections 846 and 963 authorize the imposition of consecutive sentences for conspiracy to import and also to distribute drugs. See *United States* v. *Garner*, 574 F.2d 1141, 1146-1147 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Marotta*, 518 F.2d 681, 684-685 (9th Cir. 1975). See also *United States* v. *Burkett*, 612 F.2d 449, 452 (9th Cir. 1979), cert. denied, No. 79-1400 (June 9, 1980); *United States* v. *Dyar*, 574 F.2d 1385, 1389-1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Houltin*, 525 F.2d 943, 950-951 (5th Cir. 1976), vacated in part on other grounds, 429 U.S. 1034 (1977), on remand, 553 F.2d 991 (5th Cir. 1977), subsequent opinion, 566 F.2d 1027 (5th Cir.), cert. denied, 439 U.S. 826 (1978); *United States* v. *McGowan*, 385 F. Supp. 956, 959 n.5 (D.N.J. 1974); cf. *United States* v. *Murray*, 618 F.2d 892, 896-899 (2d Cir. 1980); *United States* v. *Williams*, 548 F.2d 228, 232-233 (8th Cir. 1977). The court in *Marotta*, emphasizing that "the Congressional intent is unmistakable in that there are two separate and distinct offenses defined" (518 F.2d at 684), concluded that "Congress fully intended to permit punishing such conspiracies [to import and distribute drugs] twice as severely

as those which embraced only one of the specified criminal objects" (518 F.2d at 685). Similarly, in *Garner*, the court found that "Congress regarded conspiracy to import [drugs] and conspiracy to distribute [drugs] in the United States not only as separate offenses but as offenses so compounding each other that a conspiracy embracing each should be treated as two separate conspiracies, warranting the imposition of successive sentences for violations of the two separate conspiracy statutes" (574 F.2d at 1147). Moreover, two Justices of this Court have indicated their agreement with the holding in *Garner* that Sections 846 and 963 authorize cumulative penalties for conspiracy to import and distribute drugs. See *McKethan* v. *United States* and *Garner* v. *United States*, 439 U.S. 936, 936-937 n.1 (1978) (statement of Mr. Justice Stewart, joined by Mr. Justice Marshall).

We recognize that two courts of appeals have reached a contrary result. See *United States* v. *Honneus*, 508 F.2d 566, 569-570 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F.2d 637 (6th Cir. 1973); see also *United States* v. *Rivera Diaz*, 538 F.2d 461, 466 (1st Cir. 1976). For the reasons discussed above, these decisions rest upon a misinterpretation of this Court's precedents in *Blockburger*, *Braverman*, and *American Tobacco*. Moreover, as noted by the en banc court below (Pet. App. 34a), the question of legislative intent was not discussed at all by the Sixth Circuit in *Adcock* and was only tangentially referred to by the First Circuit in *Honneus*. Subsequent to the time that *Adcock* and *Honneus* were decided, however, this Court has made clear that the intent of Congress is central to the issue of cumulative punishments. See *Whalen* v. *United States*, *supra*, 445 U.S. at 688-689;

Simpson v. *United States*, 435 U.S. 6, 12 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion); *Iannelli* v. *United States*, *supra*, 420 U.S. at 785-786 & n.17. Accordingly, we submit that the better view is expressed in the more recent decisions in *Marotta*, *Garner*, and the present case, which declined to follow *Adcock* and *Honneus* and held instead that consecutive sentences are authorized for conspiracy to both import and distribute drugs.[10]

B.

The *Blockburger* test is "a rule of statutory construction * * * to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively" (*Whalen* v. *United States*, *supra*, 445 U.S. at 691). "The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes" (*id.* at 691-692).

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[10] Petitioners contend (Br. 24 n.*) that the Drug Control Act failed to provide fair notice, in violation of the Due Process Clause, that conspiracy to import and to distribute marijuana could be punished by consecutive sentences. However, even assuming that the principle of fair notice applies with full force to the penalty provisions of a statute (see *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979)), this claim is insubstantial. In light of the language and structure of the Act, the *American Tobacco* doctrine, and the decisions in such cases as *Marotta* and *Houltin*, petitioners were furnished with ample warning of the potential consequences of their criminal venture. Thus, our construction of the Act does not constitute a "retroactive[] * * * [and] 'unforeseeable judicial enlargement of a criminal statute' * * * [that] violate[s] due process." *Brown* v. *Ohio*, 432 U.S. 161, 169 n.8 (1977), quoting *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). See, *e.g.*, *United States* v. *Batchelder*, *supra*, 442 U.S. at 123; *United States* v. *Powell*, 423 U.S. 87, 92-94 (1975); *Rose* v. *Locke*, 423 U.S. 48 (1975); *Wainwright* v. *Stone*, 414 U.S. 21 (1973).

Because it serves as a means of discerning congressional purpose, the *Blockburger* rule is not controlling where there is "a clear indication of contrary legislative intent" (*Whalen* v. *United States*, *supra*, 445 U.S. at 692). Thus, "where the offenses are the same under the [*Blockburger*] test, cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress" (*id.* at 693). By the same token, "[t]here may be instances in which Congress has not intended cumulative punishments even for offenses that are different under * * * [*Blockburger*]" (*id.* at 693 n.7). See *Busic* v. *United States*, No. 78-6020 (May 19, 1980); *Simpson* v. *United States*, *supra*, 435 U.S. at 11-13; *Jeffers* v. *United States*, *supra*, 432 U.S. at 155.

Accordingly, *Blockburger* is properly understood to establish a presumption regarding Congressional authorization for consecutive sentences in cases in which the same criminal enterprise constitutes a violation of two statutory provisions. Where the *Blockburger* test is satisfied, it can be inferred that the statutes sanction aggregate punishments. "[A]bsent legislative intent to the contrary, the [r]ule supports a presumption that [consecutive sentences are permissible]." *Iannelli* v. *United States*, *supra*, 420 U.S. at 785-786.

With respect to Sections 846 and 963, petitioners offer two arguments in an effort to rebut the *Blockburger* presumption. They urge, first, that the legislative history of the statutes does not disclose a clear Congressional intent to impose multiple punishment for a single conspiracy (Br. 15) and, second, that the rule of lenity militates against a construction of the statutes to allow consecutive sentences (Br. 12-15). Both of these contentions are unavailing.

1. We agree with petitioners (Br. 18-19) that the legislative history of Sections 846 and 963 is silent on the question of consecutive sentences for conspiracy to import and distribute drugs. However, it is unrealistic to expect that Congress will specifically address and expressly resolve all such issues of statutory interpretation. As this Court has recently recognized, "Congress in enacting legislation rarely specifies its intent on this matter [of consecutive sentences]." *Whalen* v. *United States*, *supra*, 445 U.S. at 692, quoting H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 114 (1970). Congress is "predominately a lawyer's body" rather than "a body of laymen unfamiliar with the commonplaces of our law" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), and "[i]t is always appropriate to assume that our elected representatives * * * know the law * * *" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979)). Therefore, Congress must be presumed to have been aware of the settled *Blockburger* doctrine and to have legislated against that background. See *Whalen* v. *United States*, *supra*, 445 U.S. at 692. In these circumstances, Congressional silence cannot properly be found to refute the *Blockburger* presumption in favor of consecutive sentences in this case or to signify a disapproval of cumulative penalties.

Petitioners also argue (Br. 17-19) that consecutive sentences are not authorized because the existence of separate conspiracy offenses in Sections 846 and 963 is merely attributable to the committee structure in Congress and the fact that two different House committees considered this drug legislation. The relevant history of the legislation is set out in H.R. Rep. No. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 1-2 (1970), and Staff of House Comm. on Ways and Means, 91st Cong., 2d Sess., Comparison of Bills to Regulate Con-

trolled Dangerous Substances and to Amend the Narcotic and Drug Laws 1-2 (Comm. Print 1970).[11] As proposed by the administration, the bill initially contained a single conspiracy provision. See S. 2637, 91st Cong., 1st Sess., § 504 (1969), reprinted in *Hearings on Narcotics Legislation Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 114, 166 (1969).[12] In the House, the bill was originally referred to the Committee on Ways and Means. However, since the legislation would have affected existing drug control statutes under the jurisdiction of both that Committee and the Committee on Interstate and Foreign Commerce, the administration's proposal was divided into two bills. See H.R. 13742, 91st Cong., 1st Sess. (1969), reprinted in *Hearings on Controlled Dangerous Substances, Narcotics and Drug Control Laws Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 109 (1970); H.R. 13743, 91st Cong., 1st Sess. (1969), reprinted in *Hearings on Drug Abuse Control Amendments of 1970 Before the Subcomm. on Public Health*

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[11] See generally *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980); *United States* v. *Moore*, 423 U.S. 122 (1975).

[12] The bill ultimately passed by the Senate was generally the same as the administration's proposal but revised the penalty provisions both of the proposed legislation and of existing law. See S. 3246, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-613, 91st Cong., 1st Sess. 1-2, 97-136 (1969); 115 Cong. Rec. 39253 (1969) (remarks of Sen. Dodd); 116 Cong. Rec. 1671 (1970). S. 3246 was introduced in the House, with minor changes, as H.R. 17463, 91st Cong., 2d Sess. (1970), reprinted in *Hearings on Controlled Dangerous Substances, Narcotics and Drug Control Laws Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 3 (1970). See Staff of House Comm. on Ways and Means (Comm. Print 1970), *supra*, at 1-2.

and Welfare of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Pt. 1, 7 (1970). The House bills were generally identical to each other, with the exception that H.R. 13742 was limited to narcotic drugs and marijuana, which had been regulated by the Internal Revenue Code and other Acts within the authority of the Committee on Ways and Means, while H.R. 13743 applied to depressant and stimulant drugs that were regulated under the Federal Food, Drug, and Cosmetic Act and thus came within the jurisdiction of the Committee on Interstate and Foreign Commerce. Each of the House bills contained its own conspiracy provision. See H.R. 13742, *supra*, § 504, and H.R. 13743, *supra*, § 504.

Following hearings (see *Hearings on Controlled Dangerous Substances*, *supra*), the Committee on Ways and Means altered this format both by confining its consideration to the importation and exportation of drugs and by expanding its review beyond narcotics and marijuana to include stimulant and depressant drugs. At the same time, the Committee on Interstate and Foreign Commerce agreed to consider the other provisions of the administration's proposal. Thereafter, a joint bill was reported. See H.R. 18583, 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 33603-33604, 33605-33608, 33618-33620, 33624-33626, 33635-33639, 33662-33665 (1970). Title II of the bill (which is Subchapter I of the Drug Control Act as passed and includes Section 846) was prepared by the Committee on Interstate and Foreign Commerce; Title III of the bill (which is Subchapter II of the Act and includes Section 963) was recom-

mended by the Committee on Ways and Means. See H.R. Rep. No. 91-1444 (Pt. 1), *supra*, at 2, 5, 71. It was agreed in the House that the Commitee on Ways and Means would retain jurisdiction over future amendments relating to imports and exports of drugs under Title III, and the form of the reported bill was designed to preserve this authority (*id.* at 2-3). In substantially that form, the House bill was enacted into law. See 116 Cong. Rec. 33667, 35559, 36655, 36885, 37439 (1970); H.R. Conf. Rep. No. 91-1603, 91st Cong., 2d Sess. (1970); see also 116 Cong. Rec. 36653 (1970) (remarks of Rep. Springer) ("There [was] some minor difference on which we receded [in Conference], but nothing of any great importance. Essentially this is the House bill").

We do not believe that this legislative history, on which petitioners place such heavy reliance, should be taken to foreclose consecutive sentences pursuant to Sections 846 and 963. Rather than confirming petitioners' interpretation, the history of this comprehensive revision of the drug laws is equally consistent with the conclusion that the two House committees, focusing on different facets of the drug problem, considered a conspiracy encompassing importation and distribution to entail dual evils deserving of enhanced penalties. Virtually from the outset, the legislation in the House consisted of two bills, each containing its own conspiracy provision. Nowhere did Congress indicate an intent to disapprove the use of consecutive sentences, and the most likely understanding, in view of the well-established *Blockburger* rule, was that these distinct offenses would be subject to cumulative punishments.

Moreover, Congress was unquestionably aware of the existence of the separate conspiracy provisions, and, as the court of appeals observed (Pet. App. 39a), "[t]he enacted legislation evidences a great deal of coordination between the two committees [in the House]." For example, Subchapter II of the Act (Title III of the bill) incorporates the basic standards of Subchapter I and makes numerous express references to the provisions of that subchapter. See 21 U.S.C. 951(b), 952(a), 957(C), 958(a), (d), (f), 961(1), 962(b), (c), 965. Likewise, the subchapters "have parallel penalty structures, imposing similar penalties on similar crimes" (Pet. App. 39a), and these penalties represent a change from both the administration's proposal and prior law. Finally, Congressman Boggs, the sponsor of the bill, introduced on behalf of the Ways and Means Committee a floor amendment to Title III to provide "that section 1013 —relating to attempts and conspiracies—* * * will take effect at the same time as the comparable provision[] of title II." 116 Cong. Rec. 33665 (1970).[13]

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[13] We also note that existing law, which was superseded by the Drug Control Act, contained multiple conspiracy provisions. See 21 U.S.C. (1964 ed.) 174, 176a, 176b; 26 U.S.C. (1964 ed.) 7237(a) and (b). Thus, for example, a conspiracy to import marijuana and to transfer marijuana without an order form issued by the Secretary of the Treasury (see 26 U.S.C. (1964 ed.) 4742) constituted a violation of both 21 U.S.C. (1964 ed.) 176a and 26 U.S.C. (1964 ed.) 7237(b). In *United States* v. *James*, 494 F.2d 1007, 1025-1026 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), the court of appeals held that consecutive sentences could be imposed for a single agreement that violated two specific conspiracy provisions of the prior statutes.

In light of this legislative record, the Court should not presume that "Congress was unaware of what it accomplished * * *." *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 12. Rather, Congress's adoption of separate conspiracy provisions in Sections 846 and 963 was clearly deliberate and knowing, and this Court has "historically assumed that Congress intended what it enacted" (*ibid.*). See also *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), slip op. 18-19.

2. Petitioners also invoke the rule of lenity to support their contention that consecutive sentences are not authorized for conspiracy both to import and to distribute marijuana. However, the rule is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596. And, as the Court explained in interpreting the Drug Control Act in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, *e.g.*, *Iannelli* v. *United States*, *supra*, 420 U.S. at 789; *id.* at 795 (Douglas, J., dissenting); *id.* at 798 (Brennan, J., dissenting).

In light of these principles, the rule of lenity does not apply in this case. Where, as here, two distinct statutory provisions satisfy the *Blockburger* test, it is to be presumed that offenses thereunder "may be punished cumulatively * * * in the absence of a clear indication of contrary legislative intent." *Whalen* v. *United States*, *supra*, 445 U.S. at 691-692. In this way, *Blockburger* resolves any purported ambiguity that might otherwise serve as the premise for lenity. See, *e.g.*, *Harris* v. *United States*, *supra*; *Gore* v. *United States*, *supra*; *Blockburger* v. *United States*, *supra*. The rule of lenity cannot, by itself, be used to defeat the *Blockburger* doctrine or "to manufacture ambiguity where none exists." *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979), quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978).[14]

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[14] Petitioners contend (Br. 24-25) that the existence of ambiguity is demonstrated by the fact that the government has charged conspiracy to import and distribute drugs in a single count in some cases and in two counts in other cases. However, in 1977, the Criminal Division of the Department of Justice advised United States Attorneys that conspiracy

In addition, this Court has consistently refused to extend the rule of lenity to offenses under the federal drug laws. Recognizing that drugs present "a social evil as deleterious as it is difficult to combat" (*Gore* v. *United States*, *supra*, 357 U.S. at 389), the Court has concluded that

> the various enactments by Congress extending over nearly half a century constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter. * * *
>
> * * * Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

Id. at 390, 391. See also *United States* v. *Moore*, *supra*, 423 U.S. at 131-133, 145. Petitioners have cited nothing to suggest that Congress intended to follow a different course in enacting the Drug

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to import and distribute should be charged as separate counts (see United States Attorneys' Manual § 9-100.260, at 36 (Jan. 10, 1977)), and the previous one-count indictments cited by petitioners probably reflect no more than federal prosecutors' extensive experience under the general conspiracy statute (18 U.S.C. 371) in charging a conspiratorial agreement with multiple objectives as a single offense. Moreover, defendants had little reason to challenge the possible duplicity that petitioners point out, since a successful motion would expose them to the prospect of two sentences under a two-count indictment. The issue of multiple offenses was not raised or decided in the cases upon which petitioners rely.

Control Act of 1970,[15] and their argument for lenity is unfounded.[16]

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[15] We recognize that the Act eliminated most mandatory minimum sentences and revised the penalty structure to establish a consistent system of punishments of drug offenses in line with the penalties provided by law for other offenses. See H.R. Rep. No. 91-1444 (Pt. 1), *supra*, at 4, 11, 71; S. Rep. No. 91-613, 91st Cong., 1st Sess. 1-2, 7-8 (1969). This modification was based on Congress's determination that "[t]he severity of existing penalties, involving in many instances minimum mandatory sentences, ha[s] led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain" (H.R. Rep. No. 91-1444 (Pt. 1), *supra*, at 11). The penalty structure of the Act was therefore designed "to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past" and providing "a more realistic, more flexible, and thus more effective system of punishment and deterrence" (*id.* at 11, 71). See also 116 Cong. Rec. 996 (1970) (remarks of Sen. Dodd); *id.* at 1664 (remarks of Sen. Hruska); *id.* at 33317 (remarks of Rep. Mills); *House Hearings on Drug Abuse Control Amendments*, *supra*, at 81-82 (statement of Attorney General Mitchell); *Senate Hearings on Narcotics Legislation*, *supra*, at 212-213 (statement of Attorney General Mitchell). As this Court has recognized, "the Act was intended to 'strengthen,' rather than to weaken, 'existing law enforcement authority in the field of drug abuse.'" *United States* v. *Moore*, *supra*, 423 U.S. at 132, quoting 84 Stat. 1236 (1970); see also 423 U.S. at 139. Especially since the bill adopted by Congress was "fully endorsed" by the administration (see 116 Cong. Rec. 33317 (1970) (remarks of Rep. Mills)), this effort to enhance the effectiveness of the drug laws should not be viewed as a policy of leniency for large-scale drug offenders like petitioners.

[16] *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), upon which petitioners rely (Br. 13, 27), is not inconsistent

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE IMPOSITION OF CONSECUTIVE SENTENCES THAT CONGRESS HAS AUTHORIZED FOR CONSPIRACY TO IMPORT AND DISTRIBUTE MARIJUANA

Petitioners contend (Br. 27-30) that even if Congress has authorized consecutive sentences for violations of Sections 846 and 963, the imposition of such sentences contravenes their Fifth Amendment right not to be placed twice in jeopardy for the same offense.

Petitioners' contention is directly foreclosed by the recent decision in *Whalen* v. *United States*, 445 U.S. 684 (1980). In *Whalen*, this Court endorsed the view that the Double Jeopardy Clause does not restrict "the legislative power * * * to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them * * *" (*id.* at 689). See also *id.* at 696 (White, J., concurring); *id.* at 697-698 (Blackmun, J., concurring); *id.* at 701-702, 705-706 (Rehnquist, J., joined by the Chief Justice, dissenting); *Busic* v. *United States*, No. 78-6020 (May 19, 1980), slip op. 2 (Blackmun, J., joined by the Chief Justice, concurring), *id.* at 2 (Rehnquist, J., dissenting). Here, as in *Whalen*, "[t]he dispositive question * * * is whether Congress did

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with this analysis of the rule of lenity. In *Bifulco*, the language, structure, and history of the Act were found to disclose the Congressional intent not to authorize a special parole term for conspiracy under Section 846, and the Court relied on the rule of lenity only insofar as "doubts remain[ed]" after these sources were examined (slip op. 19). *Bifulco* did not abandon the longstanding principle that, absent an express indication of a contrary legislative intent, Congress is understood to have "an attitude not of lenity but of severity toward violation of the narcotics laws" (*Gore* v. *United States*, *supra*, 357 U.S. at 391).

* * * provide [for cumulative punishments]" (445 U.S. at 689). And, as discussed above, we believe that Sections 846 and 963, considered in light of the *Blockburger* rule, do authorize consecutive sentences for conspiracy to import and distribute marijuana.[17]

Notwithstanding *Whalen*, petitioners urge (Br. 28) this Court to determine whether violations of Sections 846 and 963, "in fact, constitute a single offense." However, they have conspicuously failed to provide any standards for making this determination, and their argument fundamentally ignores the fact that the question of multiple punishments "cannot be resolved without determining what punishments the Legislative Branch has authorized" (*Whalen* v. *United States*, *supra*, 445 U.S. at 688). As this Court has long recognized, "[c]umulative sentences * * * are not cumulative punishments, and a single sentence for several offences, in excess of that prescribed for one offence, may be authorized by statute." *Callanan* v. *United States*, *supra*, 364 U.S. at 593, quoting *Carter* v. *McClaughry*, 183 U.S. 365, 394 (1902). See also Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 113-114 (1979) (footnotes omitted):

> [I]t can be argued that the Double Jeopardy Clause contains an independent standard of its own for defining whether offenses are the same. Insofar as this thesis assumes that "same of-

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[17] Even apart from the decision in *Whalen*, we submit that, as a matter of first principles, the Double Jeopardy Clause does not bar consecutive sentences that are authorized by Congress and imposed at a single sentencing proceeding following a single trial. This position is fully set out in our brief in *Whalen*, a copy of which is being sent to counsel for petitioners, and we rely on that presentation here.

> fense" has substantive content that is independent of domestic law as defined by the legislature, it demands more of the Double Jeopardy Clause than it is capable of supplying.
>
> * * * [T]he argument assumes that the Double Jeopardy Clause is capable of reducing the concept of a criminal offense to its smallest rational unit, or atom, beyond which further fragmentation cannot occur without creating a "doubling effect." The difficulty with this assumption is that the size of any unit of prosecution depends on the legislature's purpose in making it an offense, and purposes of punishment are notoriously diverse.
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> * * * * *
>
> The flaw * * * is to assume that there is an objective basis for determining the maximum number of statutory offenses implicit in a single course of conduct. There is simply no way to make sense out of the notion that a course of conduct is "really" only one act, rather than two or three, or, indeed, as many as one likes.

Contrary to petitioners' assumption, the "legislative intent must ultimately control" the question whether consecutive sentences are proper. *Id.* at 122; see also *id.* at 157, 159.

The unsoundness of petitioners' argument is illustrated by the following example. If Congress enacted a statute expressly providing that conspiracy to import and distribute marijuana shall be subject to a maximum of 10 years' imprisonment and that conspiracy either to import or to distribute marijuana shall be punished by not more than five years' imprisonment, there can be no doubt that this statute would not offend the Double Jeopardy Clause. Cf. *Gore* v. *United States*, *supra*, 357 U.S. at 392-393.

Yet, as previously discussed, Sections 846 and 963 are not meaningfully different from the hypothetical statute. The fact that Congress sought to accomplish the same purpose through a different form of statute surely cannot be thought to violate double jeopardy.

But even if it be assumed that there may be circumstances in which multiple punishments authorized by Congress could be unconstitutional under the Double Jeopardy Clause, petitioners' sentences in this case would nonetheless be valid. To the extent that the Clause limits the authority of the legislature to define criminal offenses and to fix criminal penalties, "[t]he *Blockburger* test * * * is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes." *Simpson* v. *United States*, *supra*, 435 U.S. at 11. As discussed above (see pages 12-16, *supra*), conspiracy to import marijuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 846, plainly meet the *Blockburger* standard. And where, as here, the statutory provisions satisfy *Blockburger*, they do not prescribe the "same offense," and consecutive sentences are not barred. See *Harris* v. *United States*, 359 U.S. 19, 21-24 (1959); *Pereira* v. *United States*, 347 U.S. 1, 9 (1954); *Gore* v. *United States*, *supra*, 357 U.S. at 392-393; *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (1927); *Gavieres* v. *United States*, 220 U.S. 338, 342-344 (1911).[18]

Petitioners argue that *Blockburger* is inapplicable to conspiracy offenses. In their view, because con-

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[18] Moreover, as discussed at pages 16-17 note 8, *supra*, this is not a case "where the government relied on the same proofs to support the convictions under both statutes." (*Simpson* v. *United States*, *supra*, 435 U.S. at 12).

spiracy is an inchoate crime that consists of the agreement itself irrespective of the number of illegal objectives it encompasses (see Br. 22-25, 28), only a single offense has occurred in this case regardless of *Blockburger*.

However, nothing in the Double Jeopardy Clause requires Congress to define the crime of conspiracy in terms of a single, indivisible element—the agreement. As discussed above, the Clause provides no measure for determining in some abstract sense whether, as petitioners put it (Br. 29), there were multiple conspiracies or only one conspiracy with multiple objectives. The number of punishable offenses depends on the statute adopted by Congress. Even assuming that the Double Jeopardy Clause imposes some constraints on this Congressional decision, it is nowhere written in constitutional stone that conspiracy must be defined by reference to the underlying agreement without regard to the number or nature of the illegal objectives. And, in *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 788, this Court held, contrary to petitioners' contention here, that *Blockburger* applied to conspiracy offenses and that Congress could authorize cumulative punishments for a single agreement to violate two substantive statutes.[19]

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[19] For the reasons discussed at pages 17-18, *supra*, *Braverman* v. *United States* is not to the contrary. Rather than establishing a constitutional principle that an agreement to commit diverse crimes necessarily comprises only a single conspiracy, the Court in *Braverman* merely construed the general conspiracy statute to hold, as a matter of Congressional intent, that "[t]he gist of the crime of conspiracy *as defined by the statute* is the agreement * * *" (317 U.S. at 53; emphasis added).

It is well settled that, consistent with the Double Jeopardy Clause, a single transaction can give rise to distinct offenses under separate statutes. See, *e.g.*, *Harris* v. *United States*, *supra*; *Gore* v. *United States*, *supra*; *Blockburger* v. *United States*, *supra*. Indeed, a single act can be punished as violative of several statutes without running afoul of the Clause—for example, one who threatens or attacks another in public may be guilty of both assault and disturbing the peace (cf. *Gavieres* v. *United States*, *supra*), and one who sells liquor to a minor on Sunday may be convicted under both a Blue-Law statute and a child-liquor statute (see *Developments in the Law—Criminal Conspiracy*, *supra*, 72 Harv. L. Rev. at 966 n.335). In the same way, the Double Jeopardy Clause does not forbid Congress to conclude that an agreement to commit two offenses is more pernicious and should be more severely penalized than an agreement to commit one offense.[20]

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[20] This conclusion is entirely consistent with the cases cited by petitioners to support their claim that *Blockburger* is not appropriate to determine the validity of cumulative punishments for conspiracy. First, those cases concerned multiple conspiracies charged under the same statutory provision; as previously discussed (see page 18 note 9, *supra*), *Blockburger* is applicable in cases, like the instant one, in which two distinct statutory provisions are at issue. Second, the cases relied on by petitioners involved successive prosecutions rather than, as here, consecutive sentences imposed after a single trial; as the Court has recognized, different considerations pertain to the questions of multiple prosecutions and multiple punishments. See *Whalen* v. *United States*, *supra*, 445 U.S. at 700-701 (Rehnquist, J., dissenting); *Brown* v. *Ohio*, 432 U.S. 161, 165-166, 166-167 n.6 (1977); *Abbate* v. *United States*, 359 U.S. 187, 198-201 (1959) (opinion of Brennan, J.); see also *Illinois* v. *Vitale*, *supra*, slip op. 9-11; *Harris* v. *Oklahoma*, 433 U.S. 682 (1977).

Accordingly, if, as we contend, Sections 846 and 963 are construed to authorize consecutive sentences for conspiracy to import and distribute marijuana, the imposition of such sentences on petitioners would not violate the Double Jeopardy Clause.[21]

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[21] Although the total sentence of each petitioner exceeded the maximum for either count alone (see page 10 note 4, *supra*), the sentence imposed on each count was less than the statutory maximum for that count. In the event the Court concludes, on either statutory or constitutional grounds, that petitioners' consecutive sentences are improper, we submit that the disposition of the case that would be "just under the circumstances" (28 U.S.C. 2106) would be to remand for resentencing on one of the counts, subject to the restrictions that the re-sentence cannot exceed either the maximum sentence provided by statute for that count or the total sentence petitioners originally received on both counts. This course will enable the district court to impose the sentence it thinks most suitable in light of the Court's decision that cumulative punishments are impermissible for conspiracy to import and distribute marijuana. This issue is discussed in our brief in *Busic* v. *United States, supra,* a copy of which is being sent to counsel for petitioners; as in *Busic* (slip op. 14 n.19), the Court may wish to allow the court of appeals to consider this question in the first instance. See also *United States* v. *Hodges,* No. 79-4057 (5th Cir. Oct. 14, 1980), slip op. 318-319; cf. *United States* v. *DiFrancesco,* No. 79-567 (Dec. 9, 1980). We also note that in those cases holding that Sections 846 and 963 do not authorize cumulative punishments, the courts of appeals vacated the sentences on all affected counts and remanded for resentencing on one count. See *United States* v. *Honneus, supra,* 508 F.2d at 570, 577; *United States* v. *Adcock, supra,* 487 F.2d at 640; see also *United States* v. *Rivera Diaz, supra,* 538 F.2d at 466; *United States* v. *Fruit,* 507 F.2d 194, 195 (6th Cir. 1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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